Campana Distributor Sdn Bhd v Amseal Engineering (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING-UP NO D2–28–377 OF 1996
ABDUL AZIZ J
23 JANUARY 1998

Companies and Corporations — *Winding up — Inability to pay debts — Debts owing were disputed — Whether there has been a bona fide dispute as to indebtedness*

The petitioners ('Campana'), relying on s 128(2)(a) and (b) of the Companies Act 1965, applied to wind up the respondents ('Amseal'), on the grounds that they were unable to pay their debts of RM128,072.20 allegedly due to them. The debts, being the balance of the purchase price for goods ('Alpha tiles') sold and delivered to Amseal, were disputed by them on two grounds, namely: (i) there were defects in the tiles or some of the tiles delivered and a sum of RM299,960 was required to repair the tiling work; and (ii) there had been delay in the delivery of tiles, which resulted in delay in the completion of the project concerned, for which they have to compensate the developers ('Chee Keng') in the sum of RM1,908,000. They also claimed that Campana were liable to them for a sum of RM720,000 on account of compensation incurred by them for the delay in installing the tiles. Campana, in reply, contended that the tiles supplied by them were found, upon random inspection, to be 'within specifications'. They also refused to entertain further instructions by Amseal to supply and deliver tiles, on grounds of failure of the latter to pay the balance sum for tiles already supplied. It was also Campana's contention that if they were at all liable for any supply of defective tiles, or for any delay in supply, under Chee Keng's Purchase Order No 001 dated 25 April 1996, it is Chee Keng that would have the right to claim against Campana, not Amseal.

Held, allowing the application:

(1) Amseal's complaint of 28 December 1995 about the tiles did not merit serious consideration. Amseal had not specified the nature of the defect or explained what they meant by the tiles not being in standard form or in what aspects they were 'not to the architect's satisfaction'. The court was of the view that the tiles previously supplied had been in order considering the fact that despite Amseal's weak excuse for their failure to return the rejected tiles upon request from Campana, they still wanted full delivery of the quantities required in the original order, which quantities included the tiles already supplied despite the complaint (see p 689F–H).

(2) On the facts, the question of delay was not one that challenged the existence of the debt of RM128,072.20. Due to Amseal's request that supplies should be suspended until further notice, without

any complaint as to the shortage in supplies that should have been made in September and October 1995, and their failure to honour their agreement, Campana were not obliged to continue the supply (see pp 689I–690C).

(3) From 25 April 1996, the question of the supply of tiles needed for the project fell under a contract between Chee Keng and Campana. Campana were no longer responsible to Amseal for any defective tiles supplied or for any delay in the supply of tiles. Amseal's complaint on 22 July 1996 which followed the resident engineer's orders to rectify unsatisfactory tiling work must have reference to tiles as they had been laid, and contractually Campana were not responsible for poor tiling work and were not bound to entertain any complaint about the quality of tiles once they had been laid (see p 690D–G).

(4) On the facts, there were no bona fide dispute on account of tile defects or quality, or of delay in supply, to Campana's claim of the sum of RM128,072.20. Since Amseal failed within three weeks to pay the sum or to secure or compound for it to Campana's satisfaction, they must be regarded, according to para (a) of s 128(2) of the Companies Act 1965, as being unable to pay their debts (see p 690G–H).

[Bahasa Malaysia summary

Pempetisyen-pempetisyen ('Campana'), dengan bergantung kepada s 128(2)(a) dan (b) Akta Syarikat 1965, telah memohon untuk menggulung penentang-penentang ('Amseal'), atas alasan bahawa mereka tidak mampu membayar hutang mereka sebanyak RM128,072.20 yang dikatakan terhutang kepada mereka. Hutang-hutang tersebut, yang merupakan baki harga belian untuk barangan ('jubin Alpha') yang dijual dan dihantar kepada Amseal, dipertikaikan atas dua alasan, iaitu: (i) terdapat kecacatan dalam jubin atau sebilangan jubin yang dihantar dan jumlah sebanyak RM299,960 diperlukan untuk membaiki kerja-kerja; dan (ii) terdapat kelewatan dalam penghantaran jubin-jubin, yang mengakibatkan kelewatan dalam penyelesaian projek yang berkenaan, yang mana mereka harus memberi pampasan kepada pemaju-pemaju ('Chee Keng') dalam jumlah RM1,908,000. Mereka juga menuntut bahawa Campana harus dipertanggungjawabkan terhadap mereka untuk jumlah RM720,000 disebabkan pampasan yang ditanggung oleh mereka akibat kelewatan dalam memasang jubin-jubin. Campana, sebagai jawapan, berhujah bahawa jibin-jubin yang dibekalkan oleh mereka telah didapati, atas pemeriksaan secara rambang, memenuhi 'spesifikasi'. Mereka juga enggan mematuhi arahan lanjut oleh Amseal untuk membekalkan dan menghantar jubin-jubin, atas alasan kegagalan Amseal untuk membayar baki jumlah untukjubin-jubin yang telah dibekalkan. Ia juga merupakan hujah Campana bahawa sekiranya mereka bertanggungjawab sama sekali atas mana-mana

pembekalan jubin yang kurang sempurna, atau apa-apa kelewatan dalam pembekalan, di bawah Pesanan Belian Chee Keng No 001 bertarikh 25 April 1996, Chee Keng akan berhak membuat tuntutan terhadap Campana, bukannya Amseal.

Diputuskan, membenarkan permohonan:

(1) Aduan Amseal pada 28 Disember 1995 mengenai jubin tersebut tidak mewajarkan pertimbangan yang serius. Amseal tidak specified sifat ketidaksempurnaan atau menjelaskan apa yang dimaksudkan oleh mereka bahawa jubin-jubin tidak berada dalam bentuk standard atau dalam aspek apakah ia 'tidak memenuhi keperluan arkitek'. Mahkamah berpandangan bahawa jubin-jubin tersebut yang telah dibekalkan adalah teratur memandangkan hakikat bahawa meskipun alasan lemah Amseal untuk kegagalan mereka untuk mengembalikan jubin-jubin yang ditolak atas permintaan Campana, mereka masih mahukan penghantaran penuh kuantiti yang dikehendaki dalam perintah asal, yang mana kuantiti itu termasuk jubin-jubin yang telah pun dibekalkan walaupun aduan dibuat (lihat ms 689F–H).

(2) Atas fakta-fakta, persoalan tentang kelewatan bukanlah satu yang mencabar kewujudan hutang sebanyak RM128,072.20. Disebbakan permintaan Amseal bahawa bekalan haruslah digantung sehingga pemberitahuan lanjut, tanpa sebarang aduan mengenai kekurangan bekalan yang sepatutnya telah dibuat pada bulan September dan Oktober 1995, dan kegagalan mereka untuk menepati perjanjian mereka, Campana tidak wajib meneruskan bekalan (lihat ms 689I–690C).

(3) Mulai 25 April 1996, persoalan tentang pembekalan jubin-jubin yang diperlukan untuk projek tersebut diliputi oleh satu kontrak di antara Chee Keng dan Campana. Campana tidak lagi bertangggungjawab kepada Amseal untuk mana-mana jubin kurang sempurna yang dibekalkan atau untuk apa-apa kelewatan dalam pembekalan jubin-jubin. Aduan Amseal pada 22 Julai 1996 yang menyusuli arahan jurutera tetap untuk memperbaiki kerja-kerja pemasangan jubin yang kurang memuaskan mestilah merujuk kepada jubin-jubin sepertimana ia telah dipasang, dan dari segi kontraktual, Campana tidak bertanggungjawab atas kerja pemasangan jubin yang kurang baik dan tidak wajib untuk melayan sebarang aduan mengenai mutu jubin-jubin sebaik sahaja mereka dipasang (lihat ms 690D–G).

(4) Atas fakta-fakta, tidak terdapat sebarang pertikaian bona fide disebabkan mutu atau kektidaksempurnaan jubin-jubin, atau tentang kelewatan dalam pembekalan, kepada tuntutan Campana ke atas jumlah RM128,072.20. Oleh kerana Amseal gagal dalam tempoh tiga minggu untuk membayar jumlah tersebut atau untuk menjamin atau mencapai persetujuan untuknya sehingga Campana puas hati, mereka mestilah

dianggap, menurut s 128(2)(a) Akta Syarikat 1965, sebagai tidak mampu membayar hutang-hutang mereka (lihat ms 690G–H).] A

Notes

For cases on winding up on grounds of inability to pay debts, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 676–718. B

Legislation referred to

Companies Act 1965 s 218(2)(a), (b) C

Alex Chang (*Alex Chang & Co*) for the petitioners.
Edwin Lim (*Lim Kean Siew & Co*) for the respondents.

Cur Adv Vult

Abdul Aziz J: This petition to wind up the company ('Amseal'), which was presented on 9 October 1996, is based on the grounds that Amseal are unable to pay their debts. The petitioners ('Campana') rely on paras (a) and (c) of sub-s (2) of s 218 of the Companies Act 1965. For the purposes of para (a), the statutory notice dated 26 August 1996 demanded payment of a sum of RM128,072.20 allegedly due to Campana as at 17 February 1996, being the balance of the purchase price for goods sold and delivered on the order or at the request of Amseal. The goods were wall tiles. According to the petition, the amount outstanding as at 31 December 1995 had been RM158,426.90, but in 1996 Amseal had paid RM30,354.70, leaving a balance of RM128,072.20 stated by the statutory notice to be due as at February 1996. I must point out, although nothing has turned on this, that a letter of demand dated 30 May 1996, alleged that the amount then due was the puzzling figure of RM133,753.84. D E F

For the purposes of para (c), which requires Campana to prove to the satisfaction of the court that Amseal are actually unable to pay their debts, the petition relies on the directors' report and balance sheet in respect of Amseal for the year ended 31 December 1995, which is annexed to the petition. G

As regards to the claim of RM128,072.20 for the tiles, Amseal say that the debt was not due on 17 February 1996, and is not due now because there has been a bona fide dispute as to their indebtedness. They dispute the debt on two grounds. First they say that there were defects in the tiles or some of the tiles delivered, as a result of which they would require a sum of about RM299,960 to repair the tiling work. Second, they say that there had been delay in the delivery of tiles, which resulted in delay in the completion of the project concerned, for which they had to compensate the developers in the sum of RM1,908,000. They also claim that Campana are liable to them for a sum of RM720,000 on account of compensation incurred by them for the delay in installing the tiles. On 7 January 1997, after the petition was served on them, which was on 7 November 1996, they filed a writ to claim the three sums against Campana. H I

The wall tiles were required for use in two 21-storey blocks of medium-cost condominiums being constructed by Amseal in Taman Connaught, Cheras, for Chee Keng Properties Sdn Bhd ('Chee Keng'), the developers. The tiles were manufactured by Yi Lai Industry Sdn Bhd ('Yi Lai') and distributed by Campana. They were called 'Alpha' tiles, of which, according to Yi Lai, there was only one range. The tiles required and supplied in this case were of two sizes and eight colour codes. Size 30 x 30 cm (approximately 12" x 12") had only one colour code: OT: 3229. Size 20 x 20 cm (approximately 8" x 8") had seven colour codes: YL 2001, YL 2023, YL 2029, YL 2207, YL 2203, MB 2003 and CP 2032. All tiles left Yi Lai's factory in cartons which bore this important notice:

> Shade variation is inherent in the manufacture of ceramic tiles. In addition, certain product ranges have deliberately varied effects.
>
> Before fixing, several cartons should be opened and their contents mixed to provide an attractive natural finish and acceptable colour blend.
>
> Complaints on shades and quality will not be entertained after installation.

The first two points would be of interest to the artist or artisan, in this case Amseal's tiler. Shade variation and varied effects are no defects. That being the case, the tiler would have to use his expertise to match tiles before laying them so that the resultant finish at any particular place was satisfactory. If he or his worker simply took any tiles and laid them without artistic matching and evaluation, the result might turn out awful, and that would be the fault of application, not the fault of manufacture.

The third point means that Amseal had to check the tiles before using them. Should they decide to use them, they must have been satisfied that the tiles were of the right quality and shade. It is perfectly logical and reasonable.

The story of the supply of tiles in this case is chronicled in documentary exhibits, most of which are annexed to Amseal's affidavit in opposition (encl 29). Documents exhibited in Campana's several affidavits have been helpful in filling in certain gaps left by Amseal's exhibits. Practically, all of Amseal's averments as to facts or events in their affidavit are based on documents. In the main, those averments are general or sweeping averments that require scrutiny of the relevant documents themselves in order to see the truth in all its aspects. For that reason, the facts that I am now going to set out are facts that are evident from the documents themselves, that is to say, I do not set them out as they are averred by Amseal in their affidavit in opposition.

It all began on 16 February 1995, when Amseal issued their Purchase Order No 1586 to Campana for Alpha ceramic tiles of 'standard colour range or marble effect'. The quantities were given in terms of the areas needing the tiles: 38,000 square meters for the 20 x 20 cm tiles and 1,516 square meters for the 30 x 30 cm tiles. The prices, however, were given according to unit: RM0.73 per piece of the smaller tiles and RM1.78 per piece of the larger tiles. There was a note on the purchase order to the effect that the schedule of delivery would follow.

Exhibit A3 to Amseal's affidavit in opposition is an undated schedule of delivery transmitted to Campana by Amseal ('Sch A3'). Apparently, there had been a previous schedule because Sch A3 bore a note saying that it was to supersede the previous schedule. According to Sch A3, there was to be a delivery every month for seven months from September 1995 until March 1996, on or by the 15th day of the month. There was to be delivery of each of the eight colour codes each month, the quantity for each colour code being given in units or pieces. The total number of tiles to be delivered was 1,042,864 pieces.

According to documents exhibited by Campana, in March 1995, Campana had delivered on Amseal's order some tiles for five sample houses which were paid for in August 1995. Amseal's order dated 18 March 1995 had asked for 13,080 tiles of the eight colour codes. But that order appears to be outside the scope of Amseal's Purchase Order No 1586 and Sch A3, and has only been revealed by Campana to show that at that stage there had been no complaints about the tiles.

Amseal have exhibited a table showing the state of the supply of tiles by Campana, presumably prepared by Amseal. It is exh D to their affidavit in opposition. I shall refer to it as 'Table D'. According to Table D, of a total of 134,357 tiles scheduled to be delivered in September 1995, on or by the 15th, 78,964 tiles were delivered by 28 September 1995, leaving a balance of 55,393 tiles still to be delivered. According to Table D also, of a total of 161,436 tiles scheduled to be delivered in October 1995, on or by the 15th, 20,640 tiles were delivered by 18 October 1995, leaving a balance of 140,796 tiles yet to be delivered. I should mention in passing that the total actually given in Table D is 161,427, but that is not correct. The error is due to the amount of tiles for colour code YL 2029, which in Sch A3 is 9,054 pieces, being given in Table D as 9,045 pieces, a difference of nine pieces.

Thus far, therefore, of a total of 295,793 tiles supposed to have been delivered in September and October 1995, 99,604 tiles were actually delivered, leaving 136,189 tiles outstanding.

Then, on 19 October 1995, Amseal advised Campana that Sch A3 was cancelled, to be replaced soon by another, and that for the moment, deliveries were to stop.

The replacement schedule, which is again undated, is exhibited by Amseal as exh A5. I shall refer to it as 'Sch A5'. In all respects, Sch A5 is the same as Sch A3, except as to the time of delivery. Deliveries were still to be in seven months, including the past month of September and the past or current month of October (according as to whether Sch A5 was issued in November or in October itself), but there were now to be no deliveries in November and December. The next months of delivery after September and October were December 1995 and January, February and March 1996.

The fact that there was to be no delivery in November 1995 is acknowledged in Table D, which indicates, in respect of that month, that no tiles were required. However, for some reason that is not apparent from

A the affidavits and the documents, according to Table D, there were deliveries on 16 and 21 November 1995 of 26,860 tiles, bringing the total number of tiles delivered to date to 126,464.

Campana have exhibited Yi Lai's Delivery Order No 33124 dated 21 November 1995, which must relate to the tiles, or part of the tiles, B delivered in November. It says that the tiles were sold to Campana and delivered to Amseal and bears Amseal's acknowledgment that the tiles were received in good order and condition. According to Campana, the delivery orders for past deliveries were similarly acknowledged by Amseal. In relation to that particular delivery order, Campana also exhibited their invoice No A9511344, also dated 21 November 1995, which says that the C goods were sold to Amseal and delivered to Amseal. I assume that all of Yi Lai's previous delivery orders and Campana's previous invoices had likewise shown that the goods were finally sold and delivered to Amseal.

The day after the latest delivery in November, that is to say on 22 November 1995, Amseal instructed Campana, with reference to 'our latest delivery schedule', which I take to mean Sch A5, that 'the delivery D schedule on the 15 October 1995 have to stop now until further notice'. Since a portion of the tiles scheduled to have been delivered on or by 15 October 1995 had already, according to Table D, been delivered in October, I take those instructions of 22 November 1995, to mean that Amseal, for some reason, did not require the tiles outstanding for October to be delivered. Since E they did not require the tiles outstanding for October to be delivered, they could not have required the tiles outstanding for September to be delivered. Since Amseal, until further notice, did not want tiles that should already have been delivered to be delivered, they could not have wanted the tiles scheduled to be delivered in the future, which, according to Sch A5, should next be in January 1996, until they gave notice. In other words, the logical effect of F Amseal's instruction on 22 November 1995 is, to my mind, that there was to be no further delivery of tiles until notified. As learned counsel for Amseal said in submission, the instructions had the effect of cancelling Sch A5. That conclusion is important because up to that point in time, there had been no complaints about delay in delivery, and with the instructions of 22 November 1995, Amseal could not justifiably complain about any delay after that date G to deliver the tiles outstanding for September and October 1995. If at all any question of delay was to arise, it would have to be considered from the time when Amseal should notify Campana to resume delivery.

It was one month after Amseal's instructions of 22 November 1995 that they raised a complaint, and it was not about delay. On 28 December 1995, H they wrote to Campana to say that the tiles supplied — which must mean the 126,464 pieces delivered so far or some of them — were 'not in standard form and not to the architect's satisfaction'. I have nothing before me to show what they meant by the tiles not being 'in standard form' or in what respect the tiles were not to the architect's satisfaction. Learned counsel for Amseal, however, in submission explained that it was not a case of the I supply of a wrong colour but a case of shade variation, which he said was probably due to manufacturing defect, but which the notice on the cartons said was inherent in the manufacture of ceramic tiles.

On 2 January 1996, representatives of Amseal, including their project manager and tiler, and of Yi Lai, Chee Keng and Campana, met at the site to attend to Amseal's complaint. On 4 January 1996, Campana wrote to Amseal, with reference to the meeting, to say that the tiles were checked at random at the site store and were found to be 'within specifications'. They forwarded a test report. A

Amseal responded on 24 January 1996. They still maintained that there were tiles that they would reject. They said their tiler would do his best to choose the usable ones and the rest would be returned and these should be deducted from the amount due. They asked Campana to issue documents for adjusting the amount upon receipt of all rejected tiles. B

Campana replied on 4 February 1996 saying that they could accept the rejected tiles if they were defective in their manufacture, if they were kept in the original cartons and if they were 'packed in good condition'. They also asked Amseal, before returning the tiles, to give them written advice of the code numbers and quantities. C

Amseal did not return the tiles. There is no evidence that they objected or reacted in any other manner to the conditions set by Campana, which I think are reasonable conditions. It is only in para 19 of their affidavit in opposition that they say: D

> Syarat tambahan bahawa jubin yang ditolak perlu di dalam bentuk asal semasa penghantaran adalah tidak wajar kerana setelah memeriksa jubin-jubin tersebut ianya tidak dapat dikembalikan dalam bentuk asal. E

I reject that as a lame excuse. I do not see why the tiles, if they were to be rejected after inspection, could not be kept in the original cartons and 'packed in good condition'.

Aside from the question as to whether there were in fact tiles of defective manufacture, since Amseal did not return the tiles, they have no case to claim a deduction on their complaint of 28 December 1995, which it is clear, from the subsequent correspondence relating to that complaint, that it was about tiles that had not yet been laid. F

On 16 February 1996, Amseal paid Campana RM30,354.70 on account of the tiles supplied, which, according to Campana, left a balance of RM128,072.20, which was the amount that Campana were later to demand in their statutory notice. G

On 30 March 1996, Campana wrote to Amseal with reference to a meeting on 28 March 1996 about the amount of RM128,027.20 which Campana said was a long outstanding amount due to them that Amseal had agreed to pay in full by 8 April 1996. Campana went on to say. 'We also refer to Mr IW Lau information on the joint accounts between [Chee Keng] and [Amseal] to issue payment for our supply and delivery of Alpha ceramic tiles to the project'. That appears to be a reference to an arrangement for a joint account between Chee Keng and Amseal to pay for the tiles. Campana went on to say in the letter that after due consideration, they had decided to continue to supply tiles but on condition of prompt payment, namely within sixty days from the date of H I

delivery. Campana asked Amseal to state the delivery date and quantity and to note that Yi Lai would require three to five weeks to produce the tiles if the stock was not available.

It is clear that at that point in time, Campana regarded the delivery sch A5 as no longer applicable. They wanted Amseal to state afresh what were Amseal's requirements and when they wanted the delivery done. It is also clear, as claimed by Campana, that the decision of Campana to resume supply despite Amseal's failure to pay the outstanding RM128,072.20 was influenced by the hope that the existence of the joint account would result in prompt payment.

Amseal did not reply to that letter to state their tile requirements and delivery date or to deny the debt of RM128,072.20. They did, however, in a letter dated 4 April 1996, which made reference to Campana's letter of 30 March 1996, ask Campana to continue to supply and deliver to the project site 'building materials', payment for which would be made from the joint account with effect from 1 April 1996. Chee Keng also signed the letter in token of agreement with what was said in it.

On 12 April 1996, Campana wrote to Amseal to express disappointment over Amseal's failure to pay the RM128,072.20 which Campana said Amseal had agreed to pay in full by 8 April 1996. They said they had telephoned Amseal's office numerous times but nobody was able to advise on the payment. They asked Amseal to settle as soon as possible. Again there was no reply by Amseal. Campana would have been justified had they decided not to abide by their recent decision to continue to supply to Amseal.

On 18 April 1996, Amseal sent a memo to Campana giving new quantities for the eight colour codes, 'before deducting whatever supplied', to supersede the quantities that had been given earlier, which I take to mean given in Sch A3 or A5. The total quantity now for the eight colour codes was 1,027,126 tiles. Amseal requested full delivery by the end of May 1996. In an internal note of Amseal's dated the previous day, the new order was said to be due to 'error on the previously (sic) qty.' Campana have explained in this petition that they made no further supplies to Amseal because Amseal had failed to pay the balance sum of RM128,072.20 for the tiles already supplied.

On 25 April 1996, Chee Keng issued to Campana their own Purchase Order No 001 containing exactly the same particulars as Amseal's Purchase Order No 1586 dated 16 February 1995, with which the story of this case started, except that it did not say that a schedule of delivery would follow. Chee Keng did, however, on the same day send to Campana what I would regard as an explanatory letter giving a breakdown of the order into so many tiles for each colour code, which they said were all the tiles that would be needed for the whole project. As to the time of delivery, they said it was 'as soon as your factory can manufacture them'. Except for a small difference, the quantities were the same as those given in Amseal's memo of 18 April 1996. They totalled 1,027,121 tiles, the difference of five being due to the fact that Amseal's figure for colour code YL 2207 was 43,136, whereas

Chee Keng's figure was 43,131. The original order by Amseal, according to sch A3 or A5, had been 1,042,864 pieces. Chee Keng also requested Campana to deduct the amount of tiles previously sent to the site, which, if Table D is correct, was, as I stated earlier, 126,464 tiles.

The picture that clearly emerges is that now, on 25 April 1996, Chee Keng took it upon themselves to order the total amount of tiles needed for the whole project based on the revised required quantity as ascertained by their contractors Amseal. The new quantity, which was slightly less than the original quantity, was probably determined upon a more precise calculation of the number of tiles needed to cover the areas specified in Amseal's earlier Purchase Order No 1586, and now in Chee Keng's Purchase Order No 001. Chee Keng's attitude, as was also Amseal's attitude as seen in their memo of 18 April 1996, was that although the quantity of 1,027,121 tiles was the quantity now required for the entire project, Campana were to supply a lesser quantity, that is to say, less by the quantity already supplied. That means that to Chee Keng and Amseal, the quantity already supplied was good and acceptable in quality for the project. If it, or any part of it, was defective, then the amount stated by Chee Keng as being needed for the whole project would, in fact, not have been sufficient for the whole project.

Since Chee Keng's letter said that the delivery was to be as soon as Yi Lai could manufacture the tiles, any question of delay in delivery that might arise was no longer to be decided according to a set date or dates but subjectively according to Yi Lai's ability to manufacture.

It is Campana's case that from 25 April 1996, the contract for the supply of tiles was between Chee Keng and Campana, and that supplies under that contract had been according to the production capacity of Yi Lai, and Chee Keng never complained of any late delivery. It is also Campana's case that if they are at all liable for any supply of defective tiles, or for any delay in supply under Chee Keng's Purchase Order No 001 dated 25 April 1996, it is Chee Keng that would have the right to claim against Campana, not Amseal.

In respect of all the supplies made after the date of Chee Keng's order, Yi Lai's delivery orders stated that the tiles were delivered to Chee Keng, not to Amseal as in the case of supplies before that date, and Campana's invoices were addressed to Chee Keng, not to Amseal as in the case of the previous supplies. I conclude, therefore, in agreement with Campana, that from 25 April 1996, the contract for the supply of tiles was between Campana and Chee Keng. No doubt it was Amseal who acknowledged receipt of the tiles at the site but they must be regarded as having done so on behalf of Chee Keng. All the tiles that came to be supplied under the Chee Keng order were paid for in good time. No doubt all the payments were done on Amseal's vouchers and by Amseal's cheques, but Amseal must be regarded as paying for Chee Keng under the joint-account arrangement. The circumstances of receipt of tiles and payment for them do not contradict and cannot negative the fact that is obvious from the documents that the contract was between Campana and Chee Keng.

A It was probably at about this time in April 1996 that Amseal began to get into the trouble of late completion of the project, because there is evidence that they were given a first extension of completion to 4 May 1996. After another extension, the contractual penalty for late completion began to be calculated from 17 May 1996. It is not clear in what respects exactly the project had not been completed.

B According to Table D, the first deliveries after Chee Keng's purchase order were made between 15 and 21 May 1996. A total of 387,440 tiles were delivered, which, with the 126,464 tiles previously delivered, brought the total delivered to 513,904.

C On 30 May 1996, Campana's solicitors served on Amseal the letter of demand mentioned at the beginning of this judgment. There was no response to that letter. As will be seen, Campana after that continued to make deliveries. That could only have been because the contract was with Chee Keng. If the contract had continued to be with Amseal, Campana would not have continued to make deliveries of tiles after their solicitors' letter of demand, unresponded to as it was.

D Between 6 and 26 June 1996, according to Table D, a total of 205,017 tiles were delivered. That brought the total delivered to 718,921 pieces.

It was in June 1996 that a problem concerning tiles that had been delivered arose for the first time after Chee Keng's purchase order, as far as E the evidence that is before me goes. On 15 June 1996, the resident engineer instructed Amseal to rectify 'tiles of defective or inconsistent colour' particularly in the kitchen and the toilets from the third floor to the ninth floor of both the apartment blocks.

On 5 July 1996, the resident engineer issued a number of site instructions to Amseal instructing them to rectify various defects including F 'defective tiling works'. Twelve site instructions are exhibited, each for a unit of apartment.

On 16 July 1996, there was another note from the resident engineer to Amseal giving the same instructions as those given in his earlier note of 15 June 1996.

G Those instructions concerned tiles that had been laid. Amseal has exhibited photographs showing tiles that had been laid on walls. If those photographs are meant to show what the resident engineer had asked Amseal to rectify, then it seems to me that the defects were defects in the matching and laying of tiles. The tenor of the instructions themselves indicates that the defects were of that nature, particularly the words H 'defective tiling works' in the site instructions of 5 July 1996. At any rate, as I have said earlier on, even if the defects were defects in manufacture, Campana were not to be answerable for them once the tiles had been laid.

On 22 July 1996, Amseal wrote to Campana to say about the supply of tiles that 'size colour are not uniform and not to our satisfaction'. As regards I to colour not being uniform, Campana, as I have pointed out earlier on, had already announced on the cartons that shade variation was inherent in the manufacture of ceramic tiles. Amseal were clearly trying to put the blame

on Campana for their own poor application of the tiles. As regards to size not being uniform, the complaint is vague. It is not clear whether the tiles concerned had been laid or not. In any event, even if the tiles had not been laid and there was a manufacturing defect as regards to size, it was Chee Keng that had the right to demand satisfaction from Campana, not Amseal.

On 24 July 1996, Campana obtained from Amseal written confirmation, sought for for Campana's audit purposes, that, as at 31 December 1995, the balance of RM158,426.90 due by Amseal as shown in Campana's books was correct.

In July 1996, according to Table D, 189,574 tiles were delivered, bringing the total delivered to date to 1,908,495. In August 1996, according to Table D, 91,851 tiles were delivered, bringing the total delivered to date to 1,000,346.

On 26 August 1996, the statutory notice was served on Amseal.

On 7 September 1996, Amseal sent a memo to Campana enclosing a record of tile supply (which has not been exhibited with the memo) and asking Campana to send the balance to be supplied to the site immediately 'to prevent work delay'. On 11 September 1996, Amseal sent a reminder to Campana to send urgently the balance which they had not received 'as promised'. There is no evidence as to what Campana had promised. The available evidence is that, according to Chee Keng's order, Campana were to supply as soon as Yi Lai could manufacture. Campana, nevertheless, did reply on 12 September 1996 that they had already informed Amseal's staff that the tiles would be delivered by the end of the week. The tiles were the larger 12" x 12" tiles. The deliveries were made on 12, 13 and 21 September 1996. A total of 40,341 tiles of that type were delivered, bringing the total delivered to date to 1,040,687, which was more than the quantity ordered by Chee Keng, which was 1,027,121 tiles.

Amseal contend that those three pieces of correspondences between Amseal and Campana show that Amseal were still the purchaser of the tiles. However, the documents exhibited by Campana in respect of tiles delivered pursuant to that correspondence, namely Yi Lai's Delivery Orders Nos 41387, 41389 and 41646 and Campana's related invoice, together show that it was to Chee Keng that Campana sold the tiles that they obtained from Yi Lai. I conclude that Amseal's correspondence with Campana on those three occasions was as agents of Chee Keng and does not prove that at that time Amseal, and not Chee Keng, were the buyers of the tiles.

On 19 October 1996, Campana presented the winding-up petition.

Campana have adduced three instances of dealings after the petition was filed to provide further proof that after 25 April 1996, it was Chee Keng who bought the tiles. On 15 October 1996, Amseal requested Chee Keng to order 9,174 tiles for additional works to 'Main Entrance Step'. On 25 October 1996, Chee Keng placed an order for 9,250 tiles. On 30 October 1996, Chee Keng requested Campana to deliver as soon as possible the 28,090 tiles ordered by Purchase Order No 1003.

Those were new orders beyond the scope of Chee Keng's order of 25 April 1996, which had already been fulfilled. It is therefore a puzzling

circumstance that on 7 November 1996, Amseal wrote to Campana asking for the 'balance of the tiles' to be delivered before 13 November 1996 and holding Campana responsible for any delay. On 14 November 1996 they sent a reminder, threatening to charge Campana for late delivery. There is no clue as to what balance it was that Amseal were referring to.

There is to be observed an inconsistency in policy or attitude between the phase before 25 April 1996 and the phase after that. Before 25 April 1996, Amseal had complained about the tiles and had failed to pay the greater portion of the price of the tiles delivered, namely RM128,072.20. After 25 April 1996, Amseal had also complained about the tiles as well as alleged delay in the delivery of tiles. Yet payment for all tiles delivered after 25 April was made in good time. The inconsistency can only be explained by the fact that from 25 April, it was Chee Keng, and not Amseal, who contracted as the buyer with Campana.

In December 1996, there was an agreement for a settlement, whereby Amseal would pay the amount of RM128,072.20, without prejudice to their right to sue for damages for defects and delay, and Campana would withdraw the petition, but the settlement did not find fulfilment because Amseal's cheque for RM128,072.20 was returned with the remark 'effect not cleared'.

On 7 January 1997, Amseal filed a suit against Campana claiming damages for defects and delay.

On the facts that I have set out in chronological order, which are in the main evidenced by documents exhibited by Amseal themselves, I summarize my findings as follows:

(a) Were it not for the fact that on 28 December 1995 Amseal complained about the tiles, or some of tiles, delivered up to and in November 1995 under Amseal's Purchase Order No 1586 dated 16 February 1995, it would be incontrovertible that, as at 31 December 1995, Amseal was indebted to Campana in the sum of RM128,072.201 for the tiles supplied until then.

(b) Amseal's complaint of 28 December 1995 about the tiles does not merit serious consideration. It was about tiles that had not been laid. Amseal have not specified the nature of the defect or explained what they meant by the tiles not being in standard form or in what aspects they were 'not to the Architect's satisfaction'. After the inspection on 2 January 1996, Campana reported that the tiles were according to specifications. When Campana, on 24 January 1996, nevertheless offered to accept rejected tiles on certain reasonable conditions, Amseal never returned the tiles, giving a weak excuse for not doing so. Later on, on 18 April 1996, Amseal themselves still wanted full delivery, after giving revised figures of the quantities required on the original order, which quantities included the tiles already supplied and were, according to Chee Keng, the total requirement for the project. As I said before, that means that the tiles previously supplied had been in order.

(c) The question of delay is not one that challenges the existence of the debt of RM128,072.20. It is a question in the nature of a

counterclaim. Amseal's case is that, in view of the damages that they are claiming for the delay, the Campana's claim, they will in the end have nothing to pay to Campana. There had, however, been no complaint by Amseal in regard to the shortage in the supplies that, according to Sch A5, should have been made in September and October 1995. Amseal had instead, on 22 November 1995, asked for a suspension of supplies beginning from the October 1995 supply until further notice, which meant that even the shortage to date was not required to be supplied as yet. The next scheduled deliveries would have been in January 1996, and thereafter in February, March, April and May 1996. But, apart from there being no evidence of a request to continue the supply, Campana did not make deliveries in those months because, as they say and I accept, Amseal had failed to pay the amount of RM128,072.20 then long overdue. It was only on 4 April 1996 that Amseal requested Campana to continue to supply the 'building materials' but Campana were not obliged to continue the supply because Amseal had failed to honour their agreement to pay the sum by 8 April 1996. So Amseal cannot have any case on the question of delay up to that point in time. Indeed in his submission, learned counsel for Amseal did not raise any question of delay in respect of that phase of events.

(d) From 25 April 1996, the question of the supply of tiles needed for the project fell under a contract between Chee Keng and Campana. Campana were no longer responsible to Amseal for any defective tiles supplied or for any delay in the supply of tiles. Supplies under the Chee Keng contract were no longer to be according to any time schedule but according to Yi Lai's manufacturing capacity. In any case, Chee Keng never complained to Campana of any delay. As to the quality of tiles, if there was any defect in the quality of tiles supplied after 25 April 1996, Campana were answerable to Chee Keng, not Amseal. In any case, Amseal's complaint on 22 July 1996 about tiles, which followed the resident engineer's orders to rectify unsatisfactory tiling work, must have reference to tiles as they had been laid, and contractually Campana were not responsible for poor tiling work and were not bound to entertain any complaint about the quality of tiles once they had been laid.

In conclusion, I do not see any bona fide dispute on account of tile defects or quality, or of delay in supply, to Campana's claim of the sum of RM128,072.20. That sum was rightly due when the statutory notice was served on Amseal. Since Amseal failed within three weeks, to pay the sum or to secure or compound for it to Campana's satisfaction, they must be regarded, according to para (a) of s 218(2) of the Companies Act 1965, as being unable to pay their debts. On that ground, without having to consider whether they have been proved to be actually unable to pay their debts, I would order that they be wound up.

Application allowed.

Reported by Mohd Rizal Abidin